APPENDIX A

[No. 27852. *En Banc*. April 26, 1940.]

THE STATE OF WASHINGTON, *Appellant*, v. INLAND EMPIRE REFINERIES, INC., *et al.*, *Respondents*.[1]

[1] Constitutional Law—Privileges and Immunities—Equal Protection of Laws—Excise Taxes—Reasonableness of Classification.

[2] Same—Licenses—Taxation—Excise Taxes—Fuel Oil—Reasonableness of Classification as to Distributors of Other Fuels.

[3] Same—Fuel Oil — Discrimination — Exemption of Vessels From

[4] Same—Excise Tax on Fuel Oil—Exemptions — Discrimination—Local Refineries.

[5] Same—Excise Tax on Fuel Oil—Exemptions—Discrimination—Manufacturers of Gas.

[6] Commerce—Excise Tax on Fuel Oil—As Burden on Interstate Commerce.

[7] Statutes—Validity—Effect of Partial Invalidity.

[8] Parties—New Parties—Intervention—Parties Entitled to Intervene—Interest in Subject Matter.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 27, 1939, upon findings in favor of the defendant and interveners, in an action to collect a tax, tried to the court. Affirmed.

The Attorney General, John E. Belcher and *L. C. Brodbeck, Assistants*, for appellant.

R. E. Lowe, for respondent Inland Empire Refineries, Inc.

Thomas Balmer, Edwin C. Matthias, and *Anthony Kane*, for respondent Great Northern Railway Company.

Poe, Falknor, Emory & Howe, Wallace G. Mills, Harold P. Troy, and *E. W. Anderson, amici curiae*.

MILLARD, J.—This action was instituted by the state, under the provisions of chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21] *et seq.* (which imposes, in addition to any other tax provided by law, an excise tax upon each distributor at the

ate of one-fourth of one cent for each gallon of petroleum products withdrawn, sold, distributed, or in any manner used by such distributor within this state, except as expressly exempted by § 15 of chapter 186, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35]), to collect from the Inland Empire Refineries, Inc., a domestic corporation, taxes alleged to be due on the distribution of fuel oil by that corporation.

There is no dispute as to the amount of the tax. The purpose of the action is to test the validity of the exemption embodied in subd. (e), § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (e). It is the state's position that that subdivision is invalid and must be discarded, with the result that distributors of locally refined fuel oil would become subject to the tax.

Montana Headlight Oil Company, a corporation which is in all respects situated precisely as the Inland Empire Refineries, Inc., intervened. The Great Northern Railway Company also filed a complaint in intervention because of a certain contract with the Inland Empire Refineries, Inc., under which the latter supplies the railway company with a portion of its fuel oil within this state.

This action was consolidated for purposes of trial with the action of the *Great Northern R. Co. v. Cohn, post* p. 591, — P. (2d) —, for a declaratory judgment. In the action instituted by the railway company and in *Weyerhaeuser Timber Co. v. Cohn, post* p. 612, — P. (2d) — (which was brought to obtain a judgment declaratory of the rights of the timber company under the fuel oil tax statute (chapter 186, Laws of 1939), with respect to the exaction of a tax on fuel oil purchased by the timber com-

pany from two oil companies who were made parties defendant in the action), each plaintiff contended, in addition to insisting that it was not a distributor as defined by the statute, that the entire statute was invalid, on the ground that the exemptions embodied in subds. (d), (e), and (f) of § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subds. (d), (e), and (f), were in contravention of the equal protection clause of the fourteenth amendment to the Federal constitution and the privileges and immunities clause (Art. I, § 12) of the state constitution.

The discussion in the opinion in *Great Northern R. Co. v. Cohn, post* p. 591, — P. (2d) —, is restricted to the question whether the railway company is a distributor of fuel oil under chapter 186, Laws of 1939, or chapter 116, Laws of 1937, p. 459, if the latter act were held to be revived. The opinion in the case before us, which is an appeal by the state from the judgment holding the entire act (chapter 186, Laws of 1939) unconstitutional, is addressed to the question whether chapter 186, Laws of 1939, is unconstitutional in its entirety. Those two opinions obviate necessity of discussion in *Weyerhaeuser Timber Co. v. Cohn, post* p. 612, — P. (2d) —, of the two questions there raised.

The pertinent exemption provisions of § 15, chapter 186, Laws of 1939, read as follows:

"Sec. 15. The distributor shall be exempt from the tax herein imposed upon the following: . . .

"(d) Withdrawal, sale or distribution of petroleum products by a distributor to any vessel engaged in foreign commerce.

"(e) Withdrawal, sale or distribution by a distributor of all petroleum products derived from the refining within this state of crude petroleum or crude oil.

"(f) Withdrawal, sale or distribution of petroleum products by a distributor to any person who is subject to tax under title V, chapter 180, Laws of 1935, and amendments thereto, and who purchases such petroleum products for the purpose of converting and who does actually convert the same into manufactured gas for distribution to the public."

The fourteenth amendment to the constitution of the United States provides that:

"No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its juris liction the equal protection of the laws"

Article I, § 12, of the state constitution provides:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

[1] True, the legislature has broad powers respecting the classification of property for excise tax purposes, yet the foregoing provisions of the Federal and state constitutions forbid an arbitrary classification. The legislature may constitutionally classify persons with reference to their business occupation or inheritance, with a view of exaction from them of excise or privilege taxes differing in amount, or differing in that one class shall be taxed and another class shall be exempted, *so long as there may be* some *reasonable basis for such classification and* so long *as all in each class shall be taxed or exempted alike. State v. Hart,* 125 Wash. 520, 217 Pac. 45.

We stated in *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P. (2d) 1101, that, to comply with the equal protection clause of the Federal constitution and the privileges

and immunities clause of our state constitution, legislation involving classification must apply alike to all persons within the designated class, and reasonable ground must exist for making a distinction between those who are brought within the class and those who are excluded therefrom.

In refusing to sustain a tax upon the gross receipts of corporations operating taxicabs, when the tax was not imposed upon individuals and partnerships engaged in the same business, the supreme court of the United States said in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553:

"The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' "

See, also, *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310.

[2] The tax imposed by chapter 186, Laws of 1939, upon distributors at the rate of one-fourth cent for each gallon of petroleum products withdrawn, sold, distributed, or in any manner used by such distributor, amounts to approximately eleven per cent on the purchase price. Fuel oil and solid fuels such as coal, wood, sawdust, and coke, together with the mechanical contrivances incidental to their use such as oil burners, coal stokers, and sawdust burners, are marketed in competition with each other.

Chapter 186, Laws of 1939, violates the requirement that reasonable ground must exist for making a distinction between those who fall within the class and those who do not. No reasonable ground exists for making a distinction between those who fall within the classification of distributors of fuel subject to tax and distributors of fuel not subject to tax. That is, a distributor of fuel oil is required to pay a tax of approximately eleven per cent for the privilege of distributing fuel oil, while there is no comparable tax upon the distributors of coal, wood, sawdust, coke, gas and electricity.

All purchasers of fuel oil, as well as purchasers of coal, sawdust, wood and coke, are subjected to a compensating tax for the privilege of using in this state tangible personal property purchased at retail or produced or manufactured for commercial use. The result of the imposition of the fuel oil tax and the compensating tax is that users of fuel oil pay a tax of approximately thirteen per cent upon the fuel consumed by them, while users of the other fuels pay only the compensating tax of two per cent.

In *Pearson v. Seattle,* 199 Wash. 217, 90 P. (2d) 1020, we held that a city ordinance which imposed a license fee for revenue purposes, although ostensibly for regulatory purposes, on solid fuel dealers, while a similar license fee was not imposed on liquid fuel dealers, was unreasonable and discriminatory, therefore void, in that it singled out a particular business and imposed upon it special regulations and taxes when the ground had otherwise been fully covered by existing laws. (In that case, another ordinance was in force which applied alike to both liquid and solid fuel dealers.) We sustained the challenge that the city

could not, as it attempted by that ordinance, impose such a revenue tax under the guise of a police regulation.

To impose the compensating tax upon all persons in this state for the privilege of using tangible personal property in the state, and then to single out a particular group (users of fuel oil) and impose an additional tax upon them for the same privilege, is indefensible on constitutional grounds. It is violative of the rule that reasonable ground must exist for making a distinction between those who fall within, and those excluded from, the classification for tax purposes. It is, we repeat, in defiance of the purpose of the privileges and immunities provision of the state constitution and contravenes the equal protection provision of the Federal constitution.

[3] By subd. (d), § 15, chapter 186, Laws of 1939, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (d), the distributor shall be *exempted from* the *tax* upon withdrawal, sale or distribution of petroleum products to *any vessel engaged in foreign commerce.*

We do not find anywhere in the statute an extension of this exemption to railroads engaged in foreign commerce. Nor does the exemption extend to motor carriers or other persons or corporations engaged in foreign commerce. The legislature expressed, by this exemption provision, its intention to impose the tax upon railroads, motor carriers, and all other persons and corporations engaged in foreign commerce, but to exempt from the tax petroleum products withdrawn, sold, or distributed to vessels engaged in foreign commerce.

Plainly, the legislation does not apply alike to all persons within the designated class. There is no reasonable

ground for making a distinction between those who fall within the class and those who do not. *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P. (2d) 1101; *Supply Laundry Co. v. Jenner,* 178 Wash. 72, 34 P. (2d) 363; *State v. Hart,* 125 Wash. 520, 217 Pac. 45.

Subdivision (d), § 15, chapter 186, Laws of 1939, is unconstitutional. By that exemption subdivision, our legislature attempted to grant a special privilege to foreign commerce by vessel and denied a like privilege to foreign commerce by railroad, by motor carrier, or by other conveyances. States have no such power respecting interstate commerce. *South Carolina State Highway Department v. Barnwell Bros.,* 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510; *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947; *International Paper Co. v. Massachusetts,* 246 U. S. 135, 62 L. Ed. 624, 38 S. Ct. 292, Ann. Cas. 1918C, 617; *Webber v. Virginia,* 103 U. S. 344, 26 L. Ed. 565; *Baldwin v. Seelig,* 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55.

[4] Under § 1, chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21], a tax is imposed upon distributors, as defined in § 2 of the act, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], for each gallon of petroleum products withdrawn, sold, distributed, or *in any manner used by such distributors* within the state of Washington, except as expressly exempted by § 15 of the act.

Section 2 of the act includes within the definition of distributor those who refine within the state and those who acquire from those who refine within the state. Under subd. (e), § 15, chapter 186, Laws of 1939, all

persons who refine within the state and all persons who acquire from those who refine within the state are exempt from taxation on locally refined petroleum products withdrawn, sold, or distributed by such persons. It would follow, logically, that the consumers who purchase such products from retail distributors would not be required to pay a tax on locally refined petroleum products they use, as no tax was paid thereon which could be passed along to the consumers.

Locally refined products *used* by distributors are not exempted from taxation by subd. (e), § 15, chapter 186, Laws of 1939. That is, under this statute, the legislature selected from the group composed of all users of locally refined petroleum products a certain portion which it named "distributors," and imposed upon those within the selected group a use tax and exempted from that tax all other users of locally refined products. The exemption constitutes, also, an invalid discrimination in favor of local refineries and against distributors in petroleum products refined in other states.

The exemption under subd. (e), § 15, chapter 186, Laws of 1939, is void. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310; *State v. Robinson Co.*, 84 Wash. 246, 146 Pac. 628; *State v. Hart*, 125 Wash. 520, 217 Pac. 45; *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101; *Chalker v. Birmingham & N. W. R. Co.*, 249 U. S. 522, 63 L. Ed. 748, 39 S. Ct. 366; *Hale v. Bimco Trading Co.*, 306 U. S. 375, 83 L. Ed. 771, 59 S. Ct. 526.

The attorney general concurs in the view that subd. (e), *supra*, is unconstitutional, as disclosed by the following on page nineteen of appellant's brief:

"So far as this case is concerned, sub-section (e) of section 15 of the act, undertaking to exempt from the excise tax 'distributors' of products derived from refining within this state of crude petroleum or crude oil, in our opinion, discriminates in favor of Washington refineries and against distributors dealing in petroleum products refined in other states, imported into this state and here sold and such discrimination is violative of the equal protection clause of the 14th amendment to the constitution of the United States and section 12 of Article I of the constitution of the state of Washington."

[5] Subdivision (f), § 15, chapter 186, Laws of 1939, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35] subd. (f), under which the Seattle Gas Company is exempted from the fuel oil tax is unconstitutional.

The withdrawal, sale, or distribution of fuel oil by a distributor to any person who pays the public utility tax and uses the fuel oil to manufacture gas for distribution to the public is exempted by subd. (f), *supra*, from the tax imposed by the fuel oil statute (chapter 186, Laws of 1939).

There is no like exemption to other public utility companies which also pay a public utility tax and use the fuel oil to manufacture commodities or produce services for the use of the public. To state the facts is to declare the rule applicable thereto. The classification is so obviously, glaringly, arbitrary, capricious, and unreasonable that it seems hardly necessary to do more than invoke the equal protection clause of the 14th amendment to the Federal constitution and the privileges and immunities clause of our state constitution to strike

down this extension of special privilege to one public utility and denial to other public utilities of a like privilege of exemption. The exemption does not apply alike to all persons within a designated class, and no reasonable ground is shown for making a distinction between those who fall within the class and those who are outside the class. *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101.

It is not a sound argument that the gas companies are not within the class designated as distributors upon whom the tax is imposed because they pay the public utility tax and they convert the petroleum products into a manufactured product (gas) for distribution to the public. True, the gas industry converts fuel oil into gas for the use of the public. The railway companies convert the fuel oil into transportation for the use of the public. Light and power companies operating in this state use fuel oil in generating units (steam plants) operated to manufacture electrical energy for light, heat and power. Water carriers use fuel oil to produce transportation by boats of certain capacity operating upon the waters within the state. Certain highway transportation companies use diesel oil, which is a partially refined petroleum product, to manufacture transportation by motor vehicle. Other public utilities also pay the public utility tax. Whether they pay more or less than the gas company, is not material. The payment of the public utility tax is not a valid ground on which to base the exemption of the gas companies from the tax.

All of the public utility companies mentioned above consume the fuel oil—just like the gas company consumes the fuel oil—in producing a service, a commodity,

or a product, for the use of the public. It follows that the fact that the fuel oil is transmuted by the gas companies into manufactured gas is not a sufficient reason for the exemption of gas companies from the classification of those who are required to pay the fuel oil tax under chapter 186, Laws of 1939.

[6] Chapter 186, Laws of 1939, imposes a tax upon any person who acquires within the state petroleum products from any person importing same into the state, and upon any person who imports into the state and withdraws, sells, distributes, or in any manner uses the products within this state. The statute further requires such persons to pay a fee, file a surety bond, obtain a license, etc., as distributors. Those conditions constitute an unlawful burden on interstate commerce, hence unconstitutional. *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606; *State v. Yetter*, 5 S. E. (2) (S. C.) 291; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 S. Ct. 851; *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 S. Ct. 190; *Graves v. Texas Co.*, 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818; *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385.

[7] Next in order is the question whether, in view of § 21 (severability clause), chapter 186, Laws of 1939, p. 598, Rem. Rev. Stat. (Sup.), § 8370-80s [P. C. § 7029k-40], the invalidity of the exemptions in § 15, subds. (d), (e), and (f) of the act renders the act void as a whole.

If chapter 186, *supra*, is sustained when we invalidate subd. (d), a number of persons engaged in foreign commerce by vessel, which persons the legislature de-

clared were not to be taxed, will become subject to the tax. If we strike subd. (e) and sustain the act sans this subdivision, two refineries located within this state which the legislature said were to be exempt, will be required to pay the tax. In the event that we declared subd. (f) void and held that the remainder of the act was constitutional, all of the gas companies in the state which the legislature definitely, specifically, emphatically, stated were not to be taxed, would be rendered subject to the tax.

When chapter 186, Laws of 1939, was passed by the legislature and signed by the governor, a tax was imposed by that statute upon every distributor of petroleum products except those exempted by § 15. It would be contrary to the expressed intent of the legislature for us to sustain the act after striking down § 15, subds. (d), (e), and (f), and impose upon the persons included within those exemption clauses the distributors whom the legislature said were not to be taxed. Section 21, chapter 186, Laws of 1939, reads as follows:

"If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

In *Jensen v. Henneford*, 185 Wash. 209, 53 P. (2d) 607, we held that exemptions creating unconstitutional discriminations in the statute will not be stricken by this court and the remainder enforced, even if the act contains a severability clause and is an important revenue

measure, if the effect of so doing is to broaden the scope of the act so as to extend its provisions to a class of persons the legislature has said were not to be included. In that case, we held the personal net income tax law of 1935 (Laws of 1935, chapter 178, p. 660) was unconstitutional in its entirety, despite the argument of the attorney general that the sections creating lack of uniformity could be stricken and the remainder of the statute enforced because of the presence in the act of a severability clause to the effect that, if any section, clause, or part of the act were adjudged invalid or unconstitutional, such adjudication should not affect the remaining portions of the statute.

Section 2 of the income tax statute, p. 661, is analogous to § 1, chapter 186, Laws of 1939, and provided for the levy, collection, and payment to the state for each income year by every resident of this state for the privilege of receiving income within this state, a normal tax with respect to his income at the rate of three per cent of the amount of the net income in excess of the credits against net income as provided in §§ 9 and 10 of the act, pp. 670, 671. We held that §§ 9 and 10 must be read as a part of § 2(a), p. 661. By § 10 a married man was allowed a higher credit against the net income than a single man, which destroyed the uniformity of the act. *Jensen v. Henneford,* 185 Wash. 209, 53 P. (2d) 607, is controlling. It is not distinguisheable in principle from the case at bar. In the course of our opinion in that case, we said:

"The question then arises whether the objectionable features of the normal tax may be eliminated, under the provisions of § 70, and still leave a complete and workable act. In our opinion, any process of elimination exer-

cised under § 70 would destroy the act entirely. This would be true whether § 10 be considered by itself or read as part of § 2(a).

"If, considering § 10 by itself, we eliminate the credit allowed to single persons, it would not remedy the situation but, manifestly, would make it worse. If, on the other hand, we eliminate the credits allowed to married persons and those having dependents, the same result would follow. If we eliminate the entire section, then we will not merely have taken something from the act, but will have added something to it, because the act would then operate on all net incomes of whatever amount. But the legislature never contemplated, nor intended to accomplish, such a result. The wording of the section shows a contrary intention.

"If we consider § 10 as part and parcel of § 2(a), as it should be, then we face an even more difficult situation. It would be impossible to translate § 10 into § 2(a) in such a way that any part of it could be eliminated without completely mutilating the latter section. We would have to clip sentences midway in their expression, or else sever bodily from the section the words 'in excess of the credits against net income as provided in sections 9 and 10.' In either event, we would, as stated above, effect a result that the legislature never contemplated nor intended to accomplish. In short, any attempt at elimination would involve a complete reconstruction, indeed, a re-creation, of the act and would result in imputing to the legislature an intention which the present wording of the act does not sustain. Such a process indulged in, would not be judicial, but would be legislative, and would assume a power that we are not permitted to exercise. *Hill v. Wallace*, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822; *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala, 492, 86 So. 56, 11 A. L. R. 300."

In *Hill v. Wallace*, 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453, the constitutionality of a Federal taxing act (42 Stat. 187) entitled "An Act Taxing contracts for the sale of grain for future delivery . . . and for other purposes." was challenged. Section 11 of that act (42

Stat. 191) contained a severability clause. In holding that that clause did not give the court power to rewrite an invalid statute so as to make it enforcible, the supreme court of the United States said:

"Section 11 does not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court . . .

"It (severability clause) does not give the court power to amend the act."

If § 15, subds. (d), (e), and (f) were stricken and the remaining provisions of the act enforced, including the penalties prescribed by the statute, then the scope of chapter 186, Laws of 1939, would be extended to make that a crime which the legislature said was not to be a crime.

Distributors to vessels engaged in foreign commerce and to local gas companies and to local refiners, merely by the conduct of their businesses without payment of the tax, would be made liable to criminal prosecution, fines and imprisonment under § 16 of the act, p. 596, Rem. Rev. Stat. (Sup.), § 8370-80n [P. C. § 7029k-36], although the legislature declared in § 15 that they were not to be taxed and therefore not to be liable to such punishment for failure to pay taxes.

In *State v. Gantz*, 124 La. 535, 50 So. 524, 24 L. R. A. (N. S.) 1072, the supreme court of Louisiana, in holding that an entire act was unconstitutional because of a discriminatory exemption, said:

"We will now discuss whether the illegal exemption, because illegally discriminative, vitiates the whole statute.

"It does evidently. It is a criminal statute, as it defines a crime.

"By striking out the exemption as unconstitutional, it leaves subject to criminal prosection those the Legislature expressly intended should be exempt.

"As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will."

The rule is summarized as follows in 11 Am. Jur. 855, § 161,

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

It is next argued that, if chapter 186, Laws of 1939, is unconstitutional, the fuel oil tax act (title XI,, chapter 180, Laws of 1935, p. 749, as amended by chapter 116, Laws of 1937, p. 459) is restored to full force and effect, and that the trial court should have entered judgment in favor of appellant for the amount of tax due under the 1937 act.

That question is not in this case. The cause was tried on the theory that the state was entitled to recover under the provisions of chapter 186, Laws of 1939. The question, which was not presented in the trial court, of the revival of the prior fuel oil tax stautte, cannot for the first time be raised in this court.

There is also the factor which must be considered of proof of how many gallons of fuel oil respondent re-

finery sold and distributed during May, 1939, for which it might be liable to taxation under chapter 116, Laws of 1937.

[8] The contention of appellant that the railway company, which raised the constitutional question in this case, should not have been permitted to intervene in this action is without merit. Disregarding the question whether appellant waived its right to object to the intervention of the railway company, the statute (Rem. Rev. Stat., § 202 [P. C. § 8280]) is a sufficient answer to the argument of appellant. That section of the statute permits any person to intervene in an action who has an interest in the matter in litigation, in the success of either party, or an interest against both. The railway company, under its contract with the Inland Empire Refineries, Incorporated, was required to pay, in addition to the stated price per barrel for fuel oil, any tax lawfully found due.

The judgment is affirmed.

STEINERT, SIMPSON, BEALS, GERAGHTY, ROBINSON, and JEFFERS, JJ., concur.

BLAKE, C. J. (dissenting)—I dissent. As I view it, there is only one ground of the attack on the constitutionality of chapter 186, Laws of 1939, that has a semblance of validity. That is the exemption allowed under § 15, subd. (e), upon the "withdrawal, sale or distribution by a distributor of all petroleum products *derived from the refining within this state* of crude petroleum or crude oil." (Italics mine.) Obviously, this is an unconstitutional discrimination in favor of persons and corporations engaged in refining petroleum and crude oil

in this state. But it does not follow that the entire act must fall. For, by § 21, it is provided:

"If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the Legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

By this section, the legislature declared in language as plain as English can express that it was its purpose to lay the tax upon all distributors if the exemption defined in § 15, subd. (e), were unconstitutional. In other words, the exemption falls and the act stands as though the exemption had been omitted by the legislature itself. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. Ed. 1038, 52 S. Ct. 548; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 235; *Ex parte Schmolke*, 199 Cal. 42, 248 Pac. 244; *Di Lustro v. Penton*, 106 Fla. 160, 142 So. 898; *Gulfport Building & Loan Ass'n v. Gulfport*, 155 Miss, 498, 124 So. 658; *Boyd v. State*, 217 Wis. 149, 258 N. W. 330; *State ex rel. Attorney General v. Tittmann*, 42 N. M. 76, 75 P. (2d) 701; *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S. W. (2d) 251; *Ingels v. Riley*, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A. L. R. 1; *Johnson v. Long Furniture Co.*, 113 Miss. 373, 74 So. 283; *Smith v. Wilkins*, 164 N. C. 135, 80 S. E. 168; *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 So. 692; *People v. Stokes*, 281 Ill. 159, 118 N. E. 87; *Fairley v. Duluth*, 150 Minn, 374, 185 N. W. 390, 32 A. L. R. 1258; *State ex rel. Dillon v. Braxton County Court*, 60 W. Va. 339, 55 S. E. 382; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149.

In the first case above cited, an act was under consideration which provided for an excise tax on the production of electric energy for sale. Power furnished for pumping water for irrigation purposes was exempted from the operation of the act. The act contained a saving clause similar to § 21 of chapter 186, Laws of 1939. Addressing itself to the exemption and the effect of its invalidity upon the act as a whole, the court said:

"A further contention is that § 5 is an inseparable part of the act, and being unconstitutional, the entire act must fall with it. . . .

"The act itself (§ 11) provides that an adjudication that any provision of the act is unconstittuional shall not affect the validity of the act as a whole, or of any other provisions or section thereof. While this declaration is but an aid to interpretation and not an inexorable command . . . it has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. . . .

"It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including § 5. The primary object of the statute, under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act. was to be preserved even though the specified exemptions should fall for lack of validity."

Of a tax exempting "notes or bills for work or labor done," it was said in *Fox's Appeal, supra:*

"The exception . . . is void, under this provision, and drops out of the Act of 1885. The exception falls, but the Act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals."

MAIN, J., concurs with BLAKE, C. J.

APPENDIX B

[No. 27854. *En Banc.* April 26, 1940.]

GREAT NORTHERN RAILWAY COMPANY, *Respondent*, v. DAVE S. COHN, *as acting Director of Licenses, Appellant.*[1]

[1] Statutes—Subjects and Titles—Expression in Title of Subject.

[2] Same—Construction—Intrinsic Aids to Construction—Title and Headings.

[3] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[4] Taxation—Double Taxation—Presumptions.

[5] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[6] Statutes—Construction—Reference to Other Statutes—Repealed or Superseded Acts.

[7] Licenses—Taxation—Excise Taxes—Fuel Oil—Taxation on Distribution or Use—Statutory Provisions.

[8] Same.

[9] Statutes—Construction—Retrospective Operation.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered October 27, 1939, upon findings in favor of the plaintiff, in an action under the declaratory judgment act to obtain a declaration of rights under a taxing statute. Affirmed.

The Attorney General, John E. Belcher and *L. C. Brodbeck, Assistants*, for appellant.

Thomas Balmer, Edwin C. Matthias, and *Anthony Kane*, for respondent.

Poe, Falknor, Emory & Howe, Wallace G. Mills, Harold P. Troy, and *E. W. Anderson, amici curiae.*

MILLARD, J.—Chapter 186, Laws of 1939, p. 581 (Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21] *et seq.*), which repealed chapter 180, Laws of 1935, p. 706, as amended by chapter 116, Laws of 1937, p. 459, imposes

upon each person engaged in the oil distribution business, in addition to any other tax provided by law, an excise tax upon each distributor of one-fourth of one cent for each gallon of fuel oil "withdrawn, sold, distributed, or in any manner used by such distributor" within this state, except as expressly exempted by § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35].

Section 15, chapter 186, Laws of 1939, provides that petroleum products withdrawn, sold, or distributed to any vessel engaged in foreign commerce, petroleum products withdrawn, sold, or distributed that are derived from crude oil refined within this state, petroleum products withdrawn, sold, or distributed to those who pay a public utility tax and who use the same to produce manufactured gas, shall be exempt from the tax.

On the theory that the section exempting those who withdraw, sell, or distribute petroleum products derived from the refining within this state of crude petroleum or crude oil was unconstitutional, and if given effect rendered the entire statute unconstitutional, the attorney general of this state instituted an original proceeding in mandamus in this court March 22, 1939, to reuire the acting director of licenses to collect the tax imposed by chapter 186, *supra*, from distributors of petroleum products derived from crude oil refined within this state. The application for the writ was denied without written opinion.

Subsequently, an action was brought by the attorney general in the superior court for Thurston county to require the acting director of licenses to collect the tax from the exempted distributors just described. Motion

to quash was granted on the ground that the original proceeding in this court was *res adjudicata*. On appeal of the attorney general from the judgment of dismissal, we held that the original mandamus proceeding in this court was dismissed solely on the ground of prematurity, and that we did not pass upon the question of constitutionality of the exemption provisions of the statute. *State ex rel. Hamilton v. Cohn,* 101 Wash. Dec. 45, 95 P. (2d) 38. The cause was remanded to the trial court with direction to overrule the motion to quash.

On the ground that it is not a distributor as that term is defined in chapter 186, Laws of 1939, with respect to any of the fuel oil used by it, as hereinafter described, and on the further ground that, if it is held to be a distributor within the purview of chapter 186, *supra*, the statute is unconstitutional, the Great Northern Railway Company brought this action against the acting director of licenses of this state, joining the Tidewater Associated Oil Company as a party defendant, to obtain a declaration of its rights under the uniform declaratory judgment act (Laws of 1935, chapter 113, p. 305; Laws of 1937, chapter 14, p. 39; Rem. Rev. Stat. (Sup.), § 784-1 [P. C. §8108-21] *et seq.*) and for injunctive relief.

Trial of the cause to the court resulted in findings and judgment to the effect that chapter 186, Laws of 1939, is unconstitutional in its entirety, and that the statute has no application to the distribution, withdrawal, or use of fuel oil by anyone who is not engaged as his principal pursuit in the business of distributing, selling, withdrawing, or in any manner using petroleum products. The appeal is prosecuted from that decree by the acting director of licenses of this state.

It is the position of appellant that, while the state is inhibited by the Federal constitution from taxing imports or the business of importing, respondent may be required, under subd. (a), § 2, chapter 186, Laws of 1939, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], subd. (a), reading as follows, to pay the excise tax on the fuel oil shipped from California in tank steamers as that oil was acuired by respondent from the importer who did not pay the tax:

"(a) 'Distributor' shall mean and include . . . any person, firm, association or corporation who acquires the same within the state from any person refining it within or importing it into the state on which the tax of one-quarter (¼) cent per gallon has not been paid; . . ."

That is, the respondent may be required to pay the excise tax for the privilege of having acquired the fuel oil from the importer within the state and thereafter withdrawing the fuel oil from storage and using that oil within this state. Appellant concedes that, under our holding in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, and *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, on shipments by tank steamships from California and delivered to the railroad company in this state, the oil company and not the railroad company was the importer.

It is insisted by appellant that, as to the oil imported by respondent from Montana and Oregon in railroad tank cars and unloaded therefrom into respondent's storage tanks in the state of Washington and thereafter withdrawn and used by respondent within this state, respondent is a distributor under that part of subd. (a), § 2, chap-

ter 186, *supra*, which defines the third class of distributors as follows:

"(a) 'Distributor' shall mean and include . . . any person, firm, association or corporation who imports the same into this state and withdraws, sells, distributes or in any manner uses the same in this state."

It is urged that the question of interference with interstate commerce is answered in both instances by the statutory imposition of the excise *tax not on the importation but for the privilege of withdrawing the oil from storage after the interstate transportation* has ended and the oil has ceased to be an import.

Another contention of appellant is that, if the exemption features of chapter 186, *supra*, contravene the state and Federal constitutions, the discriminatory exemptions may be stricken from the statute, and the remainder of the act will be a complete and workable revenue measure which is valid, in view of the legislative declaration in § 21 of the statute, p. 598, Rem. Rev. Stat. (Sup.), § 8370-80s [P. C. § 7029k-40], that, if any section, etc., of the act is held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the statute.

Counsel for respondent insist that it is not engaged in business as a distributor of fuel oil, therefore respondent is not subject to the tax in question. A second ground urged by respondent is that chapter 186, Laws of 1939, is unconstitutional in that it violates certain provisions of the Federal and state constitutions.

Respondent railway company is engaged solely in the business of railroading. Its use of fuel oil is incidental to its railroad business. It buys fuel oil from local

refiners and from refiners and oil companies located in Oregon and Montana. Respondent brings the fuel oil purchased by it in Oregon and Montana into this state as company material and property of the railway company. It buys fuel oil refined in California from the Tidewater Associated Oil Company and takes delivery of that oil at tidewater in this state.

All of this fuel oil is placed by respondent in its stationary storage facilities, and respondent withdraws and uses that oil to produce the power by which its trains are operated. That is, respondent is engaged in the business of railroading and is not engaged in the business of selling, withdrawing, or distributing fuel oil. None of the fuel oil received by respondent is sold or distributed by respondent to other parties. We cannot stress too strongly the fact that the railroad company is not engaged in the business of using fuel oil, but is engaged solely in the railroad business and uses or consumes fuel oil just as it uses or consumes other supplies in conducting the business of railroading.

The fuel oil used by respondent in the operation of its trains between May 1, 1939, the effective date of chapter 186, Laws of 1939, and the trial of this cause, was acquired from four sources: Approximately seven million gallons were on hand and in storage when the act became effective; sixty thousand eight hundred and fifty-nine gallons, which were acquired after May 1, 1939, from the Inland Empire Refineries, Inc., which distributor is exempted by subd. (e) of § 15, chapter 186, Laws of 1939, p. 595, Rem. Rev. Stat. (Sup.), § 8370-80m [P. C. § 7029k-35], subd. (e), from the excise tax (which exemption appellant concedes is discriminative and violates

the equal protection clause of the fourteenth amendment to the Federal constitution and § 12 of Art. I of the state constitution); five million two hundred forty thousand and seventy-six gallons which were acquired from the Tidewater Associated Oil Company and transported and delivered to respondent at tidewater in this state in the same manner as the fuel oil was delivered to the Great Northern Railway Company by the Associated Oil Company described in the opinion of this court in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694; and more than six million gallons of fuel oil which were purchased by respondent and delivered to it in tank cars on respondent's tracks in Oregon and Montana and brought by respondent into this state as property of the railway company.

The statute (chapter 186, Laws of 1939, p. 581) challenged by respondent, is entitled:

"An Act providing an excise tax upon the business of distributing, selling, withdrawing or in any manner using refined or partially refined liquid or liquefiable petroleum products, . . ."

Section 1 of the statute, p. 581, Rem. Rev. Stat. (Sup.), § 8370-78a [P. C. § 7029k-21], imposes the tax

". . . upon every distributor . . . for each gallon of refined or partially refined liquid or liquefiable petroleum products withdrawn, sold, distributed or in any manner used by such distributor in the State of Washington, except as expressly exempted by section 15."

Three classes of persons are defined by § 2 of the act, p. 581, Rem. Rev. Stat. (Sup.), § 8370-79a [P. C. § 7029k-22], as distributors. The first class consists of those who refine, manufacture, or compound liquid or liquefiable petroleum products, *and* withdraw, sell, dis-

tribute, or in any manner use the same within this state. The second class of distributors is composed of those who acquire the petroleum products within this state from any person refining it within or importing it into this state, on which the tax of one-fourth of one cent a gallon has not been paid. The third class of distributors is defined as those persons who import the products into this state *and* withdraw, sell, distribute or in any manner use the same in this state.

[1] Article II, § 19, of the state constitution provides that no bill shall embrace more than one subject and that shall be expressed in the title; therefore, if an act is broader than its title or embraces subjects not included in the title, it contravenes Art. II, § 19, of the state constitution.

[2] In determination of the question whether the title of an act is in compliance with the constitutional requirement invoked by respondent, the title must be construed with reference to the language used in the title only and not in the light of the context of the act.

[3] It is clear that, in construing chapter 186, *supra,* with reference to the language employed in the title, the tax is on the business of dealing in petroleum products measured by the number of gallons withdrawn, sold, distributed, or used by such distributor, and was not intended to be a tax upon the business of using fuel oil in the operation of a railroad. That this is so, is readily disclosed by an examination of the provisions of other excise tax statutes enacted at the 1939 session.

In addition to *ad valorem* taxes paid by respondent during 1938, respondent paid to the state during 1939 ex-

cise taxes imposed under title V, chapter 180, Laws of 1935, p. 728, as amended and reenacted by chapter 227, Laws of 1937, p. 1138, and chapter 225, Laws of 1939, p. 976, "for the act or privilege of engaging within this state in the business of operating any railroad, by whatever power operated."

In 1933, a tax for the privilege of engaging in the railroad business was first imposed. The enactment, known as the occupational tax, was chapter 191, Laws of 1933, p. 869, and is entitled: "An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities . . . " Under that statute, a tax was exacted, for the privilege of engaging in the railroad business, at the rate of one and one-half per cent of the gross income derived from such business. In sustaining the constitutionality of that statute, we said, regarding the scope of the tax, in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 408, 25 P. (2d) 91:

"We have, then, a measure which evidences the purpose to tax the privilege of carrying on those businesses which are, in a broad sense, commercial in their nature, buying for resale at a profit, producing for sale, transporting and financing for profit (which are recognized as an important part of production), and all like enterprises which look to the purpose of bringing usable commodities of various sorts into the hands of the ultimate consumer."

Chapter 191, Laws of 1933, was reenacted by chapter 180, Laws of 1935, which chapter is divided into titles. The business and occupational tax became title II, p. 709, and a new tax entitled "public utility tax" became title V, p. 728. Titles II and V are almost the same, except that title V is applicable to public service companies and title II to business generally.

The first section of title V, which is § 36 of chapter 180, p. 728, provides that,

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. Such tax shall be equal to the gross operating revenue of the business, multiplied by the rate set out after the business, as follows:

"I. Railroad, . . . three per cent; . . . "

"Sec. 37. For the purposes of this title, unless otherwise required by the context:

"(a) The term 'railroad business' means the business of operating any railroad, by whatever power operated, for public use in the conveyance of persons or property for hire: . . . "

The activity for which the tax was imposed was for the act or privilege of engaging within this state in the business of operating any railroad by whatever power operated.

In *Seattle Gas Co. v. Seattle,* 192 Wash. 456, 73 P. (2d) 1312, 77 P. (2d) 382, we said, regarding the nature of the tax imposed:

"Although not distinguishing the exaction from a sales tax, this court, in *State ex rel. Stiner v. Yelle,* 174 Wash. 402, 25 P. (2d) 91, said:

" 'The privilege of engaging in business and gainful pursuits under the protection of our laws is something which must and does exist before the business can be established, and something far and away beyond and above the mere ownership of a business . . .

" 'This is the privilege . . . which it is now sought to tax.' "

The occupational tax imposed by chapter 191, Laws of 1933, and the public utility tax imposed by title V, chapter 180, Laws of 1935, were both sustained as a tax

upon the privilege of engaging in certain businesses, including the railroad business.

The legislature imposed a tax of three per cent on gross revenue for the privilege of engaging within this state in the railroad business and defined the phrase *"railroad business"* as the *business of operating any railroad, by whatever power operated.* (§§ 36, 37, chapter 180, Laws of 1935, p. 728.) We construed that statute as imposing a tax for the privilege of engaging in the business taxed. That statute was reenacted by the legislature in 1937 (§§ 10, 11, chapter 227, Laws of 1937, pp. 1150, 1151) and in 1939 (§§ 19, 20, chapter 225, Laws of 1939, pp. 998, 999, Rem. Rev. Stat. (Sup.), §§ 8370-36, 8370-37 [P. C. §§ 7030-96, 7030-97]).

The fuel oil tax statute (chapter 186, Laws of 1939) passed the Senate March 2nd, passed the House March 8th, and was signed by the governor March 17, 1939. Chapter 225, Laws of 1939, which reenacted the public utility tax passed the Senate March 9th, passed the House March 9th, and was signed by the governor March 21, 1939. Both acts became effective May 1, 1939.

The two statutes must be read *in pari materia.* So read, it could not be logically held that, by chapter 186, Laws of 1939, the legislature intended to impose a tax upon a railway company for the privilege of using fuel oil in the operation of its trains, when by the title of the act the tax is imposed upon the business of distributing, selling, withdrawing, or in any manner using fuel oil, when, at the same session, the legislature reenacted by chapter 225, Laws of 1939, the public utility tax law imposing a tax upon railroad companies for the privilege of

engaging in the business of operating a railroad by whatever power operated. Surely, the legislature would not have undertaken, by the method of passing two different statutes at the same legislature, to exact two different taxes of respondent, one for the privilege of engaging in the railroad business by whatever power operated and another for the privilege of using fuel oil to generate that power.

The privilege of engaging in the railroad business by whatever power that business is operated must include the privilege of using fuel oil essential to the operation of its trains, the operation of which constitutes the railroad business.

In *Jensen v. Henneford,* 185 Wash. 209, 218, 53 P. (2d) 607, in holding the net income tax law unconstitutional, we said:

"But the mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself. [Citing authorities.]

"The right to receive property (income in this instance) is but a necessary element of ownership, and, without such right to receive, the ownership is but an empty thing and of no value whatever. 'In common understanding, to hold property is to own it. In order to own or hold, one must acquire.' . . . The right to receive, the reception, and the right to hold, are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and, therefore, the property (income) itself."

So, too, if one is to engage in the business of railroading, one must operate trains. Trains cannot be operated without motive power, and in order to utilize motive power, one must consume fuel. It is indispensable to

the right to operate trains, to consume fuel to produce the motive power necessary to that operation. To tax any one of these elements, is to tax their sum total, viz., the right to engage in the business; and, of course, to tax their sum total is to tax all of the necessary elements.

[4] The result would be double taxation if chapter 186, Laws of 1939, be construed as imposing a tax on the railway company for the privilege of using fuel oil to generate power to operate its trains. The presumption is against the intention of the legislature to impose double taxation on the same property, and that presumption prevails unless overcome by the express words of statute. *State ex rel. Wolfe v. Parmenter,* 50 Wash. 164, 174, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; 61 C. J. 137, § 71.

The privilege of engaging in the business of operating a railroad, as well as using the fuel, were taxed under the provisions of chapter 225, Laws of 1939, and were taxed under the provisions of titles IV and V of chapter 180, Laws of 1935, pp. 726, 728, as amended by chapter 191, Laws of 1937, p. 943, and chapter 227, Laws of 1937, p. 1138, before chapter 186, Laws of 1939, p. 581, was enacted. There is no reasonable basis for the conclusion that it was intended to include the railroad business in the business intended to be taxed under the title of chapter 186, Laws of 1939.

[5] Our first fuel oil tax statute was enacted as title XI of chapter 180, Laws of 1935, p. 749. That revenue act was entitled, in part:

"An act relating to revenue and taxation; . . . providing for the levy and collection of a tax upon the sale, use or distribution of fuel oil and diesel oil . . . "

On January, 1936, an action was commenced by the state to recover the amount of the tax assessed, under title XI, chapter 180, Laws of 1935, upon a shipment of fuel oil from California by an oil company to the Northern Pacific Railway Company. This was prior to the enactment of chapter 116, Laws of 1937, p. 459, which amended title XI, chapter 180, Laws of 1935. On May 3, 1938, we held in the action by the state to collect the tax (*State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090) that, although title XI which included §§ 78 to 81, inclusive, of chapter 180, of the Laws of 1935, pp. 749 to 751, is captioned "fuel oil tax," it was clear from the language of § 78, p. 749, that the tax therein provided was not a tax on fuel oil, but it was an excise tax imposed upon persons with respect to the privilege of distributing fuel oil. We further hold that the Northern Pacific Railway Company was not a distributor of fuel oil, therefore it was not liable for the tax imposed by title XI, chapter 180, Laws of 1935.

In 1937, the legislature enacted chapter 116, Laws of 1937, which amended title XI, chapter 180, Laws of 1935. The act was entitled: "An Act providing an excise tax upon the business of selling fuel oil . . . " That act became effective March 13, 1937, which was prior to the filing of our opinion in *State v. Fidelity & Deposit Co., supra.* The amendatory statute *changed* the nature of the tax *from* one for the *privilege of distributing fuel oil to* a *tax upon* the *business of selling fuel oil.*

The question whether the tax imposed by title XI, chapter 180, Laws of 1935, was intended to be restricted to those dealing in the distribution of fuel oil as a busi-

ness or also to be applied to those who used fuel oil, where withdrawal and distribution are incidental to the principal use, was not involved in *State v. Fidelity & Deposition Co.*, 194 Wash. 591, 78 P. (2d) 1090, or in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694.

Chapter 186, Laws of 1939, broadened the base of the tax and made the tax applicable to all refined or partially refined liquid or liquefiable petroleum products, rather than restricting the tax to fuel and diesel oil, as in the 1935 and 1937 statutes. Chapter 186, Laws of 1939, is entitled:

"An Act providing an excise tax *upon the business of* distributing, selling, withdrawing or in any manner using refined or partially refined liquid or liquefiable petroleum products, . . . and repealing . . . [Title XI], chapter 180, Laws of 1935 as amended by chapter 116, Laws of 1937. . . . " (Italics ours.)

It is clear to us that, by again using the word "*business*" in the title of chapter 186, Laws of 1939, as it did in chapter 116, Laws of 1937, but as it refrained from doing in chapter 180, Laws of 1935, the legislature plainly indicated its intention to impose a *tax upon the business of distributing* petroleum products *rather than upon the use of petroleum products in a business where* the *use and distribution* of such products *are* merely *incidental to* the *principal business*.

[6] In the construction of statutes which reenact with certain changes, or repeal, former statutes, or which contain revisions or codifications of earlier laws, resort may be had to repealed and superseded statutes *in pari materia*. An apt authority is *In re Phillips' Estate*, 193 Wash. 194, 74 P. (2d) 1015, in which we held that, in the

construction of a statute which restricted the inheritance of pretermitted heirs by the omission of the word "descendants" of certain heirs in one clause, it is proper to consider the repealed or superseded act, including the word in the same section of the former act *in pari materia*, from which an intent to change the law must be presumed.

[7] On September 1, 1939, which was subsequent to the effective date (May 1, 1939) of chapter 186, Laws of 1939, we held in *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, that the railway company, under facts not materially dissimilar from those in *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, was not a distributor under chapter 180, Laws of 1935, and chapter 116, Laws of 1937; and that the only change in the 1935 statute by the 1937 enactment was to discontinue the tax on use. The legislature repealed instead of amended the 1935 and 1937 fuel oil statute and, by the title it gave to the 1939 enactment (chapter 186, Laws of 1939), indicated its intention, once more, to change the tax to a tax upon "the business."

The reason in the legislative mind for this change may have been the fact that the public utility tax statute exacted a tax for the privilege of engaging in various businesses, among which was "the operation of a railroad, by whatever power operated," and the compensating tax statute, imposed a tax for the privilege of using tangible personal property purchased at retail or produced or manufactured for commercial use. Hence, the fuel oil tax statute should be restricted to a tax upon the fuel oil distribution business and should not cover

the field already occupied by the public utility and compensating taxes.

That the legislative intent was to limit the fuel oil tax to persons engaged in the business of dealing in refined or partially refined liquid or liquefiable petroleum products, is evidenced when we construe, as we stated above, *in pari materia* and in accordance with their titles, the compensating tax statute and the fuel oil and public utility tax statute. Further (chapter 186, Laws of 1939), an examination of the entire fuel oil tax statute will disclose a number of provisions which conclusively establish such legislative intent.

Section 3 of chapter 186, Laws of 1939, p. 582 (Rem. Rev. Stat. (Sup.), § 8370-80a [P. C. § 7029k-23]), provides that every person, before becoming a distributor or continuing *in business as a distributor,* shall make an application to the director of licenses for a license authorizing such distributor or person *to engage in business as a distributor.* The section further provides that, before granting any license authorizing any person *to engage in business as a distributor* the director of licenses must require such person to file a bond with said director.

Section 4, p. 584 (Rem. Rev. Stat. (Sup.), § 8370-80b [P. C. § 7029k-24]), provides that, when the application for a license has been accepted and the filing fee therefor has been paid and the bond filed and approved, the director shall issue to such distributor a license *to transact business as a distributor* in this state. The director is then required to issue to the licensee a certificate, which the distributor is required to display conspicuously *at his place of business* in this state. In the event that any application for license *to transact business as a*

distributor in this state is filed by any person whose license shall at that time have been canceled for cause by the director, the director shall, after a hearing, have the right to refuse to issue to such person a license to *transact business as a distributor* in this state.

Section 5, p. 586 (Rem. Rev. Stat. (Sup.), § 8370-80c [P. C. § 7029k-25]), provides that, *whenever* a distributor *ceases to engage in business as a distributor by reason of* the *discontinuance, sale, or transfer of* the *business of* such *distributor* it shall be the duty of such distributor to notify the director in writing at the time the discontinuance, sale, or transfer takes effect. Such notice shall give the date of discontinuance and, *in the event of a sale or transfer of the business,* the date of the discontinuance and *the name* and address of the *purchaser of the business.* If such notice is not given, the purchaser of the business becomes liable to the state for the amount of all taxes accrued against the distributor so selling or transferring his business to the extent of the value of the property and business to be acquired.

Section 6, p. 587 (Rem. Rev. Stat. (Sup.), § 8370-80d [P. C. § 7029k-26]), provides for monthly reports by the distributor of the gallonage of petroleum products withdrawn, sold, distributed, or used by such distributor.

Section 7, p. 587 (Rem. Rev. Stat. (Sup.), § 8370-80e [P. C. § 7029k-27]), provides for penalty for failure to promptly make tax payments and also penalizes one who acts as a distributor without first securing the distributor's license required under the act.

Section 9, p. 591 (Rem. Rev. Stat. (Sup.), § 8370-80g [P. C. § 7029k-29]), requires each distributor to keep a

true and accurate record of his "transactions in petroleum products."

Under § 13, p. 593 (Rem. Rev. Stat. (Sup.), § 8370-80k [P. C. § 7029k-33]), the director of licenses is authorized to cancel the license of any distributor ". . . if said director shall ascertain and find that the person to whom such license has been issued *is no longer engaged in the business of a distributor.* . . ." (Italics ours.)

Section 20, p. 598 (Rem. Rev. Stat. (Sup.), § 8370-80r [P. C. § 7029k-39]), provides that "The tax herein levied is in lieu of any excise, privilege or occupational tax upon the business of withdrawing, selling or distributing petroleum products . . ."

Manifestly, the foregoing provisions of chapter 186, Laws of 1939, disclose the legislative intent was not to tax the mere use or consumption of petroleum products, first covered by other tax statutes, but the intent was to tax those persons who are engaged in the business of dealing in such products. Section 20 of the statute declares that the tax is in lieu of any excise or privilege tax upon the business of withdrawing, selling, or distributing petroleum products, and, like the other provisions of the act, it will be noted, relates to "the business of withdrawing, selling or distributing petroleum products."

Respondent, by use of fuel oil in the operation of its trains, is not engaged as a distributor in "the business of distributing, selling, withdrawing or in any manner using petroleum products." No useful purpose would be served by citing—and quoting profusely therefrom—the numerous authorities in harmony with the view we have expressed above.

The second ground—unconstitutionality of chapter 186, Laws of 1939—urged by respondent for affirmance of the judgment is sustained in *State v. Inland Empire Refineraies, Inc., ante* p. 573, — P. (2d) —.

[8] The position of appellant that, if chapter 186, Laws of 1939, is unconstitutional, respondent is subject to the tax imposed by chapter 116, Laws of 1937, which is revived by the voiding of chapter 186, Laws of 1939, is not tenable.

As we stated earlier in this opinion, the legislature evinced very clearly its intention when it enacted chapter 116, Laws of 1937, to impose an excise tax upon the business of selling fuel oil. It should be borne in mind that, under the provisions of chapter 180, Laws of 1935, the tax was imposed upon distributors for each gallon sold, distributed, withdrawn, or used by distributors. That provision was changed by § 1, chapter 116, Laws of 1937, p. 459, to provide for a tax for each gallon "sold, distributed or withdrawn by him."

The legislature, by the 1937 statute, restricted the fuel oil tax to those engaged in the business of selling. The only change in the 1935 statute by the 1937 enactment was, as we said in *Great Northern R. Co. v. State,* 200 Wash. 392, 93 P. (2d) 694, to discontinue the tax on use. In the case cited, the question before us was whether the railway company imported the fuel oil and thereby came within the definition of distributor. We held that it did not. There was not presented to us for determination the question whether, if the railway company was the importer of the fuel oil, it would be subject to tax on oil brought in for use in the operation of the railway company's line of railroad.

Even if the 1937 act were revived, respondent would not be subject to the fuel oil tax, in view of the fact that it does not sell fuel oil. Such use as respondent makes of fuel oil is incidental to respondent's operation of its railroad. It is clear that chapter 186, Laws of 1939, which became effective May 1, 1939, on which date respondent had in storage in this state more than six million gallons of fuel oil, does not by its terms apply to that oil; and it cannot, it is equally plain, under rules long since enunciated and consistently followed, of statutory construction, be made to apply to that oil. To be taxable under chapter 186, Laws of 1939, one must be a distributor. To be a distributor, as defined by the statute, one must fall within one of three classes of persons, viz., (1) persons who refine, manufacture, or compound liquid or liquefiable petroleum products, *and* withdraw, sell, distribute or in any manner use the same; (2) persons who acquire such products within this state from any person who refines it within or imports it into this state on which the prescribed gallonage tax has not been paid; (3) persons who import such products into this state *and* withdraw, sell, distribute or in any manner use the same within this state.

Surely, no one will argue that the first definition applies to the respondent. If the respondent is a distributor with respect to the oil asquired prior to the effective date of the statute, it would have to be under the second or third definition.

The second definition defines a distributor as one who *acquires* the petroleum within the state from another who has not paid the tax. The acquisition alone makes one a distributor, but it only makes such a person a dis-

tributor who acquires the products. It has no relation to one who previously made the acquisition. The word "acquires" is clearly in the future sense. If the legislature intended to define as a distributor one who had "acquired" such products, it could and, doubtless, would have said so in terms.

The rule is that the intention of the legislature is to be deduced from what it said, and that a tax will not be extended by construction to things not named or described in the statute. Both importation and withdrawal or use are necessary to constitute a person a distributor under the third definition. Either the importation or the withdrawal or use will not have that effect, and both the importation and the withdrawal or use must occur subsequent to the effective date of the statute. Respondent did not, after the effective date of the statute, import the fuel oil under consideration at this point, hence it is not a distributor with respect to that oil.

[9] Even a cursory reading of chapter 186, Laws of 1939, shows that the legislature intended that the statute have a prospective and not a retrospective operation. The well-settled rule, which needs no citation of sustaining authority, is that a statute will be given a prospective interpretation unless by its terms it is expressly declared to be retroactive.

Respondent is not, either under chapter 186, Laws of 1939, or—conceding *arguendo* that the act was revived —chapter 116, Laws of 1937, a distributor of fuel oil with respect to fuel oil acquired or imported subsequent to May 1, 1939, or with respect to fuel oil on hand and in storage May 1, 1939.

We note on page 23 of appellant's reply brief that counsel for appellant concedes, in view of *State v. Fidelity & Deposit Co.*, 194 Wash. 591, 78 P. (2d) 1090, and *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P. (2d) 694, that Tidewater Associated Oil Company is not a distributor with respect to fuel oil sold by it to respondent. This obviates the necessity of discussing the question of liability of defendant, under chapter 186, Laws of 1939, for any tax on that oil.

The judgment is affirmed.

STEINERT, SIMPSON, BEALS, GERAGHTY, ROBINSON, and JEFFERS, JJ., concur.

BLAKE, C. J. (dissenting)—In registering dissent in this case, I assume the constitutionality of chapter 186, Laws of 1939, p. 581, for the reasons stated in the dissenting opinion in case No. 27852. That respondent is a "distributor" in contemplation of the act, seems to me to be too clear for argument. The term is defined in § 2(a), p. 581, as follows:

" 'Distributor' shall mean and include every person, firm, association or corporation who refines, manufactures or compounds liquid or liquefiable petroleum products, and withdraws, sells, distributes, or in any manner uses the same in this state; *also any person, firm, association or corporation who acquires the same within the state from any person refining it within or importing it into the state on which the tax of one-quarter (¼) cent per gallon has not been paid; or any person, firm, association or corporation who imports the same into this state and withdraws, sells, distributes or in any manner uses the same in this state.*" (Italics mine.)

Obviously, by this broad definition, the legislature intended to prevent the escape from a tax of ¼ cent per gallon of any fuel oil sold or *used* in this state—whether

it was imported by the user or another. That the exaction sought to be levied against respondent is neither a tax on imports nor an unconstitutional burden on interstate commerce, is firmly established by numerous decisions of th supreme court of the United States. *Nashville, C. & St. L. R. v. Wallace,* 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191; *Wiloil Corp. v. Pennsylvania,* 294 U. S. 169, 79 L. Ed. 838, 55 S. Ct. 358; *McGoldrick v. Berwind-White Coal Mining Co.,* — U. S. —, 60 S. Ct. 388; *McGoldrick v. Compagnie Generale Transatlantique,* — U. S. —, 60 S. Ct. 670.

In the case first cited, the court had under consideration a statute which, for all intents and purposes, is indistinguishable from ours. Sustaining the validity of the statute, the court said:

"Chapter 58, Tennessee Public Acts, 1923, as amended by Chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline . . .' within the state at the rate of 2¢ per gallon on the gasoline sold or stored, the tax 'to be used solely in the construction and maintenance of a highway system in the state.' But § 3 provides: 'The tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors storing any of the products mentioned in this Act and distributing the same or allowing the same to be withdrawn from storage whether such withdrawal be for sale or other use. . . . ' Storage of the gasoline and withdrawal of it from storage within the state for use or sale, are, as the state Supreme Court has held, the events which, by the very terms of the statute, call it into operation. . . .

"The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points or origin to points outside the state of Tennessee; and on the ground that it is in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier,

and is thus an unconstitutional burden on interstate commerce.

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. *General Oil Co. v. Crain*, 209 U. S. 211; *Bacon v. Illinois*, 227 U. S. 504; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 669; *Hart Refineries v. Harmon*, 278, U. S. 499; *Gregg Dyeing Co. v. Query*, 286 U. S. 472. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. . . . The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation. . . .

"It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes. . . . Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations."

MAIN, J., concurs with BLAKE, C. J.